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No. 92 - 476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ARRIBA, LIMITED,
Petitioner,
v.
PETROLEOS MEXICANOS,
Respondent.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Fifth Circuit**

PEMEX'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When suit is brought against a foreign state under the Foreign Sovereign Immunities Act, does the plaintiff have the burden to allege facts demonstrating the existence of subject matter jurisdiction?

2. When the charter of an instrumentality of a foreign state endows it with the power to sue and be sued within that foreign state, does that charter provision constitute a statutory waiver of the protections of the Foreign Sovereign Immunities Act of the United States?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 5

I. The dismissal of Arriba's claims without jurisdictional discovery was proper and accords with the rulings of this Court and all Circuit Courts of Appeals that have addressed the issue 6

II. The Fifth Circuit's rejection of Arriba's argument that Pemex has waived its sovereign immunity from suit is supported by all relevant authority, including the legislative history of the FSIA 13

CONCLUSION 16

APPENDIX A 1a

TABLE OF AUTHORITIES

CASES **Page**

Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) 6, 8

Arriba, Ltd. v. Petroleos Mexicanos, 962 F.2d 528 (5th Cir. 1992) 2, 6

Boelens v. Redman Homes, 748 F.2d 1058 (5th Cir. 1984) 6

Compania Mercantil Argentina v. United States Shipping Board, 40 T.L.R. 601 (1924) 15

Compania Mexicana, S.A. v. United States District Court, 859 F.2d 1354 (9th Cir. 1988) 11, 12

Dayton v. Czechoslovak Socialist Republic, 672 F. Supp. 7 (D.D.C. 1986), *aff'd*, 834 F.2d 203 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988) 13-15

First Nat'l City Bank v. Banco Para el Comercio Exterior de Cube (Bancec), 462 U.S. 611 (1983) 9

Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438 (D.C. Cir. 1990) 11

FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990) 8

Gould, Inc. v. Pechiney Ugine Kuhlmann,
853 F.2d 445 (6th Cir. 1988) 11

Loeffer v. Frank, 486 U.S. 549 (1988) 15

McNutt v. General Motors Acceptance Corp.,
298 U.S. 178 (1936) 7

Mitchell v. Forsythe, 472 U.S. 511 (1985) 10

Rush-Presbyterian - St Luke's Medical Center v. Hellenic Republic, 877 F.2d 574 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989) 11

Segni v. Commercial Office of Spain,
816 F.2d 344 (7th Cir. 1987) 11

Siderman de Blake v. Republic of Argentina,
965 F.2d. 699 (9th Cir. 1992) 11

Sierra Club v. Shell Oil Co.,
817 F.2d 1169 (5th Cir. 1987) 8

Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.,
258 U.S. 549 (1922) 15

Stena Rederi AB v. Comision de Contratos,
923 F.2d 380 (5th Cir. 1991) 10

United States v. Pink, 315 U.S. 203 (1942) 4

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 476 (1983) 8

STATUTES

28 U.S.C. §§ 1602 - 1611 5

28 U.S.C. § 1603(a) 14

28 U.S.C. §§ 1603-1604 14

28 U.S.C. § 2679(a) 15

MISCELLANEOUS

Gordon, *Foreign State Immunity in Commercial Transactions* (1991) 13

H. Rep. No. 1487, 94th Cong., 2d Sess. 15, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604 15

Houston Chronicle, Sept. 10, 1992 2

Sucharitkul, *State Immunities and Trading Activities in International Law* (1959) 15

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The Respondent, Petroleos Mexicanos (commonly known as Pemex), a decentralized agency of the sovereign government of the United Mexican States, prays that this Court deny the petition of Arriba, Ltd. for writ of certiorari.

STATEMENT OF THE CASE

Arriba's colorless statement of the case bears only the faintest resemblance to Arriba's allegations and rhetoric in the courts below: gone are Arriba's xenophobic characterizations of Mexico as a corrupt land devoid of law; gone are Arriba's paranoid cries of international conspiracy reaching to the highest levels of the Mexican government; gone are Arriba's claims of billion dollar damages, bribes, threats, and beatings.

Arriba is straining mightily to whitewash the sordid tale of its dealings with notorious criminals. This Court would be best served by reference to Arriba's original complaints (set out in the Appendix to Arriba's Petition) and to the Fifth Circuit's concise description of those allegations, which that Court aptly compared to Oliver Stone's movie "JFK." *Arriba, Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 537 (5th Cir. 1992), *reprinted* at the Appendix to Arriba's Petition ("A.App.") at 18a.[1] Pemex is constrained to

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1. Although Arriba chides Pemex and the Fifth Circuit Court of Appeals for casting aspersions on Arriba's character, particularly for the fitting reference to "JFK" (Petition at 11 n.7), Arriba's own allegations allege involvement with criminals (hence the basis for Arriba's RICO claims). The central figure and defendant in Arriba's allegations is La Quina (the moniker of Joaquin Hernandez Galicia), who was recently sentenced to thirty years in prison for a variety of crimes including the murder of a federal judge. *See* Houston Chronicle, Sept. 10, 1992. Thirty-nine of his cohorts, including at least one other Arriba defendant, were also sentenced to long prison terms. Another central figure in Arriba's story, who for some reason was never made a defendant, Jose Cruz Contreras, the man who incorporated and allegedly ran Comater, is subject to a pending extradition request by the Mexican government. Jose Cruz Contreras is charged with being La Quina's gun smuggler, among other crimes.

Arriba's complaints of mudslinging are also insincere. Arriba's restrained demeanor is newly donned. The lower courts were regaled with arguments such as the following:

> Pemex's brief suggests that President de la Madrid's administration cleaned up the country. Who is kidding whom, and for whom is this polemic written?

R. Vol. 6 at 28.

> Arriba is *quite* skeptical about the gracious invitations at the end of Pemex's brief: "Pemex is amenable to suit in Mexico (*id.* at 56) . . . [R]edress can certainly be had within Mexico for fraud, extortion, and fraudulent transfer; and alter ego is recognized..."

identify just a few of the clear omissions and distortions in Arriba's newest statement of the case.

Foremost, Pemex never dealt or contracted with Arriba. Arriba dealt and contracted with, and originally sued (on the identical subject matter of its current claims, on three previous occasions over six years, *id.* at 531-32; A.App. at 5a-6a), only the Union of Petroleum Workers of the Republic of Mexico (the "Union"),[2] the Union's Commission of Contracts,[3] and various officials of each, never Pemex. As the Fifth Circuit noted, "Arriba has not alleged that Pemex negotiated, participated or contracted with it directly in any way." *Id.* at 534; A.App. at 12a. Arriba's attempts in its Petition to imply the contrary are misleading and do not comport with Arriba's allegations. "Arriba admits that [its Union deal] was structured to avoid any direct dealings with Pemex officials or any other branch of the Mexican government." *Id.* at 530; A.App. at 3a (footnote describing the reasons for such circumspection omitted).

Arriba's complaints chronicle its dealings with members of the Union, most notably La Quina, whereby the Union's Commission of Contracts (a private entity) allegedly

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Yeah, right.

* * * * *

Is this a joke? Pemex cannot be serious about the practicability of a fair trial of Arriba's claims in Mexico.

Id. at 34. And these are mere examples.

2. Sindicato de Trabajadores Petroleros de la Republica Mexicana.

3. Comision de Contratos del Comite Ejecutivo del Sindicato de Trabajadores Petroleros del la Republica Mexicana.

twice promised that it could "arrange"[4] for Pemex (a governmental agency) to supply Arriba with oil at bargain prices without the need of a contract with Pemex. Bribes were apparently the intended substitute for a written agreement with Pemex.[5] According to Arriba, it never funded the bribes, so the oil never materialized.[6]

Arriba attempted to saddle Pemex with responsibility for the Commission's promises by alleging that La Quina's corrupt empire controlled Pemex, such that the private-Union and governmental agency-Pemex were alter egos.[7] According to Arriba, La Quina's promises and the Commission's contracts bound Pemex, despite Pemex's lack of assent or participation in them. Of course, Arriba might as well be suing New York City because the Union sold it the Brooklyn Bridge; the Union had no more right to sell Mexico's oil, which is vested by the Mexican Constitution in the sovereign.[8]

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4. *See, e.g.*, Arriba's Complaint ¶ 36 *reprinted* at A.App. at 5a.

5. *Id.* at ¶¶ 15-17 (A.App. at 52a).

6. *Id.* at ¶¶ 15-20 (A.App. at 52a-53a).

7. *See, e.g., id.* at ¶¶ 9-10 (A.App. at 50a).

8. Although not a factor in the Fifth Circuit's analysis (*see* 962 F.2d at 530-31 n.3; A.App. at 3a n.3), the illegality of Arriba's Union-deals was definitively established by the Declaration of the Attorney General of Mexico, which was submitted to the district court. The full translation of that declaration, which contains a complete history of the relevant laws of Mexico, is set forth in the Appendix to this Brief. Pemex also notes that this Court has previously accepted such declarations as definitive interpretations of foreign law. *United States v. Pink*, 315 U.S. 203, 220 (1942).

Arriba's jurisdictional theory mirrors its claims for direct relief: jurisdiction over Pemex is predicated on attributing to Pemex the Union's contacts here. Arriba's convoluted attribution argument, however, masks a more practical reason for Pemex's involvement in this action. Having on three separate occasions sued the Union, its Commission, and various of its officials, without ever naming Pemex as a responsible party, and having garnered hundred-million dollar default judgments but less than total satisfaction, Arriba finally turned to the one party it knew had substantial assets, Pemex. So, for the first time, Arriba sued Pemex, claiming that this sovereign arm of the Mexican government is a RICO enterprise, a criminal. To substantiate these assertions, Arriba sought discovery from the highest echelons of the Mexican government, which the Fifth Circuit described as portending "massive, intrusive discovery in Mexico on highly sensitive domestic issues." 962 F.2d at 536; A.App. at 17a (footnote omitted).

As for the instigator of this action, Arriba is a shell. It has no office, address, or telephone number apart from its original lawyer's, no employees other than its present lawyers, and no assets other than the lawsuits brought by those lawyers.

The Fifth Circuit Court of Appeals, finding no basis for entertaining Arriba's claims against Pemex, an instrumentality of the Mexican government, ordered the action dismissed for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act (the "FSIA"). 28 U.S.C. §§ 1330, 1441(a) & 1602-1611 Here, Arriba seeks a very limited review of that ruling.

REASONS FOR DENYING THE WRIT

This action focuses on the existence of subject matter jurisdiction. Pemex is a decentralized agency of the United Mexican States, and as such is generally immune from the jurisdiction of United States courts. The scope of jurisdiction over Pemex is determined entirely by the FSIA. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 435-41 (1989). And, as a grant of subject matter jurisdiction, the FSIA must be strictly construed against the exercise of jurisdiction. *Id.* at 687; *see also Boelens v. Redman Homes*, 748 F.2d 1058, 1067 (5th Cir. 1984).

The theory by which Arriba sought to find jurisdiction over Pemex under the FSIA, which depended on attributing the actions of private persons and entities to Pemex, was, in the Fifth Circuit's words, "breathtakingly bold." *Arriba*, 962 F.2d at 534; A.App. at 11a. It was certainly unprecedented. In keeping with its newly scrubbed rhetoric, however, Arriba avoids any detailed discussion of its jurisdictional theory or even the allegations that allegedly support it. Instead, Arriba calmly claims a right to "limited" jurisdictional discovery and asserts that Pemex is a mere commercial enterprise that has waived its immunity under the FSIA. These facially innocent arguments, however, hide more than they explain.

I. The dismissal of Arriba's claims without jurisdictional discovery was proper and accords with the rulings of this Court and all Circuit Courts of Appeals that have addressed the issue.

Arriba claims, and asks this Court to rule, that, "Plaintiffs enjoy a general right to conduct jurisdictional discovery." Petition at 13. Arriba's Petition argues that the Fifth Circuit's instruction to dismiss Arriba's claims without discovery conflicts with the decisions of other circuits,

namely the Second, Sixth, Ninth, and D.C. Circuits. *Id.* at 15.

In focusing on its claimed "general right to conduct jurisdictional discovery," Arriba avoids challenging the Fifth Circuit's rulings that the factual allegations in Arriba's Complaints do not support jurisdiction and that Arriba's "breathtakingly bold theory" of jurisdiction, as alleged, is insupportable. 962 F.2d at 534-37; A.App. at 11a-18a. In lieu of attempting to defend its unprecedented jurisdictional theories, Arriba makes a seemingly innocuous request for discovery.

Arriba's discovery position is, however, no less bold, and no less unprecedented. It would allow a plaintiff a jurisdictional "fishing expedition" against any party, including a foreign state, simply for the asking, with no requirement that the plaintiff first allege some facts which, if true, would establish jurisdiction. There is no such right. And, far from conflicting with the decisions of the other circuits, the Fifth Circuit's refusal to allow Arriba its "massive, intrusive discovery" in this case comports with the decisions of this Court and all other circuit courts. *See id.* at 536; A.App. at 17a.

Arriba's claimed blanket entitlement to "jurisdictional" discovery[9] does not exist absent some allegations supporting jurisdiction. Proper jurisdictional discovery is designed solely to resolve *disputed* fact

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9. Although labelled "jurisdictional," Arriba's discovery requests were indistinguishable from discovery on the merits. Basically, both Arriba's claims for relief and its jurisdictional theory relied upon the allegation that Pemex (as part of the government of Mexico) and the Union (a private entity) were alter egos, and establishing that premise required, by Arriba's own estimation, a monumental amount of discovery. *See* 962 F.2d at 536 n.15; A.App. at 17a n.15.

questions. First, however, the plaintiff "must allege in his pleadings the facts essential to show jurisdiction . . . . If he does make them, an inquiry into the existence of jurisdiction is obviously for the purpose of determining whether the facts support his allegations." *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936). *See also FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 607 (1990); *Sierra Club v. Shell Oil Co.*, 817 F.2d 1169, 1172 (5th Cir. 1987)("[A] court may determine it lacks jurisdiction based on the pleadings alone.").

In FSIA cases in particular, this Court has sanctioned determinations of subject matter jurisdiction based solely on the plaintiff's allegations, without the opportunity for discovery. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989) (*reversing*, 830 F.2d 421 (2d Cir. 1988)); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 476 (1983). In *Amerada Hess*, this Court found Argentina immune under the FSIA, based solely on the plaintiff's allegations. 488 U.S. at 432, 439-43; 830 F.2d at 423 ("Because the district court dismissed [the plaintiff's] complaint for lack of jurisdiction, we must accept appellant's allegations as true."). In *Verlinden*, this Court stated that "even if the foreign state does not enter an appearance to assert an immunity defense, a district court still must determine that immunity is unavailable under the Act." 461 U.S. at 493 n.20. Of course, if the foreign state does not appear, that determination must be made on the basis of the plaintiff's allegations alone.

In this case, the Fifth Circuit assumed *arguendo* the veracity of Arriba's allegations and concluded that those allegations "do not confer jurisdiction over Pemex consistent with the FSIA." 962 F.2d at 537; A.App. at 18a-19a. Arriba, however, does not request review of the legal basis for that conclusion, but claims instead that it should be

allowed broad-range discovery despite that conclusion.

It is at this juncture that Arriba's tactical decision to divert attention from its novel jurisdictional theory and to focus solely on discovery misfires, because the fatal flaw in Arriba's claims is not a lack of discovery but the bankruptcy of Arriba's jurisdictional theory. The broad attribution theory on which Arriba relies for jurisdiction, whereby Pemex, a governmental arm of the United Mexican States, was allegedly responsible for the actions and jurisdictional contacts of the Commission and Union, both private entities, rests upon this Court's *Bancec* opinion. *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cube (Bancec)*, 462 U.S. 611, 626-27 (1983).

The Fifth Circuit "wholeheartedly" rejected Arriba's theory, holding, "*Bancec* is inapposite to this case." 962 F.2d at 534-35; A.App. at 12a-13a; *see also id.* at 536-37; A.App. at 14a-17a.

By failing to seek review of that ruling of the Fifth Circuit, and thus conceding that its allegations do not support jurisdiction, Arriba effectively forecloses any need for determining if discovery is needed. As the Fifth Circuit explained, "because Arriba's allegations do not satisfy *Bancec*, permitting discovery will not cure the FSIA jurisdictional deficiency." *Id.* at 537; A.App. at 18a (footnote omitted). Significantly, Arriba declined the opportunity to amend its pleadings.[10]

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10. At the hearing on Pemex's motion to dismiss and other motions, including a motion for more definite statement (pled in the alternative), the following exchange occurred:

> THE COURT: Do you want to stand on your complaint, Mr. White, as I am getting to rule on all of these motions?

Although not essential to its analysis, the Fifth Circuit correctly noted that jurisdictional discovery should be permitted more circumspectly and with greater court supervision when sought from a foreign state, than from a private entity. In analyzing the restrictions to be placed on discovery from foreign sovereigns, the Fifth Circuit turned to this Court's decisions regarding the protection afforded to domestic governmental officials. *Id.* at 534; A.App. at 11a. *See also Stena Rederi AB v. Comision de Contratos*, 923 F.2d 380, 385-86 (5th Cir. 1991) (citing *Mitchell v.*

> MR. WHITE: YES....But with that -- and as far as the record is concerned, we have filed now two controverting affidavits.

R.Vol. 9 at 46.

Although Arriba criticizes the Fifth Circuit for "ignoring altogether the evidentiary material that Arriba was able to present," *see* Petition at 12, that evidence is irrelevant because, at best, such evidence attempts solely to corroborate Arriba's allegations of jurisdictional facts, which were not contested for purpose of Pemex's motion to dismiss. In fact, the affidavits were originally proffered on the act of state issue, which the Fifth Circuit did not reach, and sought to controvert Pemex's proof on that issue, which is why Arriba refers to its affidavits as "controverting affidavits."

On the jurisdictional question, however, Pemex did not contest Arriba's factual allegations. Neither did the Fifth Circuit dismiss or discount those allegations. So, Arriba's existing "proof" is irrelevant, as is any evidence that discovery might have provided.

Of course, Pemex continues to challenge the actual veracity of Arriba's scurrilous allegations against Pemex and the government of Mexico. Pemex also contests the competency of Arriba's affidavits, which contain more political rhetoric than statements of fact. *See also* the Declaration of the Attorney General of Mexico, the English translation of which is reprinted in the Appendix to this Brief.

Forsythe, 472 U.S. 511, 528 (1985)).

The comparision is apt and well-established. Including the Fifth Circuit, at least five circuits have expressly equated the immunity afforded foreign states under the FSIA with that granted domestic government officials, based on the holding that the immunity granted each is immunity from suit, not merely from damages.[11] As the

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11. *E.g.*, *Stena*, 923 F.2d at 386 (5th Cir.); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 442 (D.C. Cir. 1990); *Rush-Presbyterian - St Luke's Medical Center v. Hellenic Republic*, 877 F.2d 574, 576 n.2 (7th Cir.), *cert. denied*, 493 U.S. 937 (1989); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450-51 (6th Cir. 1988); *Compania Mexicana, S.A. v. United States District Court*, 859 F.2d 1354, 1358 (9th Cir. 1988) (per curiam); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 345-47 (7th Cir. 1987).

Arriba's reliance on the *Gould* opinion is misplaced. In fact, the very next words following Arriba's quotation from *Gould* (on page 16 of its Petition), which Arriba cites to support a blanket right of discovery, state:

> Yet, extensive discovery and other extended proceedings at this stage may frustrate the significance and benefit of entitlement to immunity from suit. Accordingly, discovery and fact-finding should be limited to the essentials necessary to determining the preliminary question of jurisdiction.

853 F.2d at 451.

Arriba also quotes extensively from the D.C. Circuit (on pages 16 and 17 of its Petition), but pretermits its quotation just prior to, "the District Court should closely control and limit the discovery and fact-finding so as to avoid 'frustrat[ing] the significance and benefit of ... immunity from suit.' *Gould*, 853 F.2d at 451." *Foremost-McKesson*, 905 F.2d. at 449. That Court adds: "It is further clear that the *plaintiff* bears the burden of asserting facts sufficient to withstand a motion to dismiss ...." *Id.* at 447 (emphasis in original).

Fifth Circuit noted, "it is unimaginable that FSIA would authorize broader exposure to suit of a foreign government instrumentality such as Pemex than that of domestic governmental units." 926 F.2d at 537; A.App. at 17a.

Because Pemex's immunity under the FSIA is, like that of domestic governmental officials, immunity from suit not merely from damages, discovery should be allowed only if "*necessary* to determining the preliminary question of jurisdiction." *Gould*, 853 F.2d at 451 (emphasis added). That is, "the *plaintiff* bears the burden of asserting facts sufficient to withstand a motion to dismiss ...." *Foremost-McKesson*, 905 F.2d at 447 (emphasis in original). As the Fifth Circuit stated in this case, while explaining the same authority Arriba cites before this Court, "As the other FSIA cases demonstrate, discovery may be used to confirm specific facts that have been pleaded as a basis for enforcing the commercial activities exception, but it cannot supplant the pleader's duty to state those facts at the outset of the case." 962 F.2d at 537 n.17; A.App. at 18a-19a n.17 (citation omitted).

Arriba's entire point of error is that it should have been allowed more discovery, but discovery makes sense only when issues of fact are in dispute. Arriba's fatal deficiency, as noted by the Court of Appeals, is not that it needed discovery, which it did not get; it is that Arriba

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Arriba's own quotation from the Ninth Circuit establishes that discovery is permissible only "[t]o the extent that the jurisdictional facts are disputed...." *Siderman de Blake v. Republic of Argentina*, 965 F.2d. 699, 713 (9th Cir. 1992) (quoted by Arriba at Petition at 17), *petition for certiorari filed*, 61 U.S.L.W. 3156 (Aug. 20, 1992).

In another opinion, not cited by Arriba, the Ninth Circuit dismissed an action under the FSIA based on the pleadings alone. *Compania Mexicana*, 859 F.2d. at 1358.

needed jurisdictional allegations, which it did not make, and a viable jurisdictional theory, which it never asserted. Despite Arriba's contrary presentation to this Court (resting on abbreviated quotes, *see supra* n.11), this Court and all the Circuit Court of Appeals are agreed on this point: absent factual allegations supporting subject matter jurisdiction, an action against a foreign state should be dismissed. Arriba's complaints have that deficiency, the Fifth Circuit dismissed for that reason, and Arriba's Petition for Writ of Certiorari does not challenge the correctness of that ruling. That dismissal should not be disturbed over Arriba's discovery complaint.

II. The Fifth Circuit's rejection of Arriba's argument that Pemex has waived its sovereign immunity from suit is supported by all relevant authority, including the legislative history of the FSIA.

As the Fifth Circuit stated, Arriba's "imaginative"[12] "argument that endowing a state entity with the capacity to sue and be sued constitutes an implied waiver of sovereign immunity [under the FSIA] is 'easily rejected.'"[13] Arriba bases its argument on one out-of-context sentence from this Court's *Bancec* opinion. 462 U.S. at 625. *Bancec* begins by recognizing that the FSIA grants immunity from suit *in the United States* to all foreign governmental instrumentalities (*id.* at 620-22), and then describes the powers of the typical government instrumentality, which generally include the

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12. 962 F.2d at 538; A.App. at 20a.

13. *Id.* at 538 n.19; A.App. at 20a n.19 (quoting M.W. Gordon, *Foreign State Immunity in Commercial Transactions* § 6.18, at 6-46 (1991), *citing Dayton v. Czechoslovak Socialist Republic*, 672 F. Supp. 7 (D.D.C. 1986), *aff'd*, 834 F.2d 203 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988)).

power to sue and be sued (*id.* at 624-25). Arriba's argument rests entirely on one sentence from that description, which reads, "Provisions in the corporate charter stating that the instrumentality may sue and be sued have been construed to waive the sovereign immunity accorded to many governmental activities, thereby enabling third parties to deal with the instrumentality knowing that they may seek relief in the courts." *Id.* at 625 (footnote omitted). From this sentence, Arriba makes the unsubstantiated leap that *Bancec* holds that a capacity to sue and be sued waives immunity from any and all suits *in this country*.

Bancec, however, does not hold that instrumentalities, by virtue of having the capacity to sue and be sued, waive their sovereign immunity *under the FSIA*. The statement in *Bancec* is merely part of a general description of instrumentalities and indicates only that a typical instrumentality can be sued in its own country. Arriba cites no authority for its far different conclusion, and its reasoning is contradictory. This Court in *Bancec* began its analysis by recognizing that government instrumentalities are protected by the FSIA. *Id.* at 620-22. Only thereafter did it note that the "typical government instrumentality" has the capacity to sue and be sued. *Id.* at 625. Surely this one sentence did not vitiate the immunity protection afforded such instrumentalities under the FSIA, which this Court had just recognized in the immediately preceding discussion.

The true meaning of *Bancec* is mirrored by Congress' actions in adopting the FSIA. The FSIA grants immunity to all foreign states, expressly defined to include instrumentalities. 28 U.S.C. § 1603(a). "Moreover, the legislative history to § 1603 [of the FSIA] establishes that entities with the capacity to 'sue and be sued' were included within the protection of § 1604." *Dayton*, 672 F. Supp. at

11.[14] Also, like this Court in *Bancec*, Congress noted that the typical government instrumentality has the capacity to be sued, and included that power within its definition *of the entities protected by the FSIA*. H. Rep. No. 1487, 94th Cong., 2d Sess. 15, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6604, 6613-14; *see also Dayton*, 672 F. Supp. at 11. Thus, as the *Dayton* court noted, "Congress intended to extend sovereign immunity to all foreign state instrumentalities endorsed with the capacity to sue and be sued when it enacted the FSIA." 672 F. Supp. at 11.

Arriba's waiver theory does not even hold true for domestic governmental agencies. With the adoption of the Federal Torts Claims Act, Congress once again cloaked all "sue and be sued" agencies of the United States with the identical sovereign immunity afforded all other agencies of this country.[15] And, even before that Act, when such domestic agencies were sued abroad, the United States government argued for, and foreign governments recognized, the sovereign immunity of those "sue and be sued" agencies outside the United States. *Compare Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922)(United States government-owned shipping company not immune from suit in the United States) *with Compania Mercantil Argentina v. United States Shipping Board*, 40 T.L.R. 601 (1924) (same corporation immune from suit in England); *see also* Sucharitkul, *State Immunities and Trading Activities in International Law* 132 (1959)

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14. The Fifth Circuit cited *Dayton* (965 F.2d at 538 n.19; A.App. at 20a n.19), although for some reason Arriba asserts that "[t]he Fifth Circuit does not appear to embrace the reasoning of *Dayton*." Petition at 22 n.14.

15. 28 U.S.C. § 2679(a); *Loeffer v. Frank*, 486 U.S. 549, 561-62 (1988). With the FSIA, Congress did the same for foreign instrumentalities. *Dayton*, 672 F. Supp. at 11.

(discussing *Compania Mercantil*).

Arriba's waiver argument thus provides no basis for granting writ of certiorari. The Fifth Circuit's ruling on this issue conforms with all relevant authority.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

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APPENDIX A

Declaration of the Attorney General of Mexico
Dr. Enrique Alvarez del Castillo

(from R. Vol. 7 at 115-30)

C.P. Francisco Rojas
Director General
Petroleos Mexicanos
PRESENTE

In reference to your request, I have received and reviewed copies of the complaint, in English and in Spanish, brought against Petroleos Mexicanos and others before the United States District Court for the Southern District of Texas, Houston Division, No. H-90-1767, styled Arriba, Ltd. v. Petroleos Mexicanos, et al.

In that regard, pursuant to the authority granted by Article 102 of the Political Constitution of the United Mexican States, and Article 4, section V of the Law of the Attorney General's Office of the Republic of Mexico currently in effect, issued on November 13, 1983 and published in the Official Gazette of the Federation [Diario Oficial de la Federacion] on December 12, 1983, I hereby give my opinion based upon the facts alleged in the above-referenced lawsuit.

This opinion covers three basic issues. The first describes the legal status of Petroleos Mexicanos and the laws which govern that entity. The second discusses the constitutional amendments, statutes, regulations, and official decrees issued by the Federal Government in the years 1982, 1983, and early 1984, as the basis of the moral renovation program established under former President Lic. Miguel de la Madrid Hurtado and the relation of those laws to the allegations in this lawsuit. Finally, this opinion explains the legal status of the Union of Petroleum Workers of the Republic of Mexico [Sindicato de Trabajadores Petroleros de la Republica Mexicana] and the Commission of Contracts of the Union, a civil society [Comision de Contratos del Sindicato, Sociedad Civil].

I.

In accordance with articles 25 and 28 of the Political Constitution of Mexico, the public sector (the Government) has exclusive authority over all areas of strategic value to the national development, including petroleum, other hydrocarbons, and the basic petrochemicals. To manage these strategic activities, the State acts through its Organisms and Enterprises, which are owned and controlled by the Federal Government.

Article 27 of the Constitution states that the Nation has direct dominion, inalienable and imprescriptible, of all natural resources, including petroleum and other hydrocarbons. Paragraph 6 prohibits the issuance of concessions for the exploitation of petroleum and other hydrocarbons and establishes that the Nation itself must perform exploitation of the same in the manner directed by the Regulatory Law.

The Regulatory Law to Article 27 of the Constitution in the Petroleum Branch, presently in effect, and published in the Official Gazette of the Federation on November 29, 1958, reiterates that the Nation has direct dominion over all natural resources, and again states that the exploitation of hydrocarbons must be performed by the Nation directly. Article 4 of the Regulatory Law states:

> The Nation will carry out the exploration and exploitation of petroleum and the other activities that are referred to in Article 3 by means of Petroleos Mexicanos, a Decentralized Public Institution whose structure, functions, and internal regulations are established by the law, regulations, and other corresponding dispositions. . . .

Additionally, Article 9 of the Regulatory Law to Article 27 of the Constitution states that "The petroleum industry is exclusively under federal jurisdiction. . . ."

The Organic Law of Petroleos Mexicanos, currently in effect and published in the Official Gazette of the Federation on February 6, 1971, contains the functions, powers, and duties of Petroleos Mexicanos in order to fulfill the objectives established by the Constitution and its regulatory laws. Article 1 [of the Organic Law] states:

> Petroleos Mexicanos, created by decree of June 7, 1938, is a Decentralized Public Organism of the Federal Government, of a technical, industrial, and commercial nature, with its own legal status, and its own patrimony, with domicile in Mexico City, Federal District.

In accordance with the Regulatory Law of Article 27 of the Constitution, the Organic Law of Petroleos Mexicanos grants to the Federal Government exclusive jurisdiction over the petroleum industry. Article 17 states:

> In all actions, agreements, and contracts in which Petroleos Mexicanos is involved, the federal laws of Mexico shall apply, and the disputes in which it is a party, whatever their nature, shall be of the exclusive jurisdiction of the Federal Courts of Mexico. . . .

Based on the foregoing, it is easily concluded that Petroleos Mexicanos, created by decree of the Federal Congress, with its own legal status and patrimony, is a Decentralized Organism that forms part of the Public Administration of the Federal Government of Mexico.

Therefore, the only courts with jurisdiction over PEMEX are the Federal Courts of the Mexican Republic, a power which is ratified and reiterated by other rules, currently in effect, of the Mexican Juridical System such as the Organic Law of the Federal Public Administration and the Federal Law of Parastatal Entities, both implementing Article 90 to the Constitution and its regulations.

II.

In December of 1982, the then President of the United Mexican States, Lic. Miguel de la Madrid Hurtado, announced his program for the moral renovation of mexican society, which proclaimed, inter alia, two fundamental responsibilities:

The first has as its goal the elimination of the corruption prevalent in the government and in its relation with society. Therefore, the Public Administration must be honest, professional, and efficacious. Bureaucratic burdens must be removed before they overwhelm society. It is essential to put the Power of the State in the hands of the people, so that it can serve as the basic protector of the peoples' rights.

The second has as its object the identification, investigation, processing, and sanctioning, with legality, efficiency, severity, and impartiality, of any corruption prevalent within governmental entities.

The reforms and additions to the Political Constitution, in conjunction with the secondary laws, were the first step towards the fulfillment of the moral renovation within the government, so that society can find support in those reforms and thereby totally vindicate its rights; so that the law can effectively control the public servants in their

relationship with society, and so that their functions are not diminished and so that their conduct will comport with the law.

In order to fulfill these goals, upon the initiative of the President of the United Mexican States, the Federal Congress amended twenty-two articles of the Federal Constitution, and promulgated and substantially amended their respective regulatory laws. Among those reforms are:

(a) In December of 1982, articles 22, 73, 74, 76, 94, 97, 108, 109, 110, 111, 112, 113, 114, 127, and 134 of the Constitution were amended in order to define the duties of public servants at all levels. These amendments basically established that public servants cannot maintain business or personal interest in direct conflict with their offices, and further established personal liability for violations of their duties.

(b) In the same way, Article 134 of the Political Constitution of Mexico and its Federal Regulatory Law were amended to insure impartial contracting with governmental entities, thereby guarantying the State the most favorable conditions available regarding price, quality, financing, opportunity, and other pertinent factors.

(c) Likewise, in December of 1982, the Secretary General of the Comptroller's Office of the Federation was created, as permitted by a previous reform of the Organic Law of the Federal Public Administration. According to Article 32 bis, section XVII of the cited

Organic Law, the Secretary has the power to oversee and to investigate the acts, omissions or conduct of the public servants, to establish administrative responsibilities, to impose the sanctions established by the law, and when appropriate, to file the proper charges with the District Attorney [Ministerio Publico], and to provide any requested assistance.

(d) In 1982, Title Ten of the Federal Penal Code was substantially reformed to include 8 new crimes imputable to public servants, among them we should highlight the Abuse of Public Office, Trafficking in Influence, and Intimidation and Collusion of Public Servants. These federal crimes were added with new administrative sanctions that the Federal Congress enacted as part of the Federal Law of the Responsibilities of Public Servants; all of these laws manifest the purposes of the constitutional reforms, particularly the goals of Article 134 of the Constitution.

(e) On January 28, 1984, Lic. Carlos Salinas de Gortari -- then-Secretary of Budget and Planning and acting within the authority granted him by articles 32 of the Organic Law of the Federal Public Administration, and 6, 28, 30, 33, 37, 38, 51, 55, 56, and 57, and others of the Law of Public Works -- issued an official proclamation, which was published in the Official Gazette of the Federation on January 30, 1984, directed at enforcing obedience to the reforms; its objective was to combat the contracting practices then existing between governmental entities and the private

sector. This proclamation reaffirmed the principles of the Law and decreed that the public entities were required to follow the mandates of the Constitution and its regulatory laws.

Accordingly, any contract that violates these procedures, or other agreements with legitimate ends but which are executed without recourse to the requirements of the federal law, shall be considered null and void as a matter of law. The most substantial effect of the order of Lic. Carlos Salinas de Gortari as to Petroleos Mexicanos was to abrogate the contractual clauses between Petroleos Mexicanos and the Union of Petroleum Workers of the Republic of Mexico by which Petroleos Mexicanos was obligated to grant to the Union, in favor of the Union's civil societies, contracts without a public bidding process or without fulfilling all formal requisites. This official proclamation of the Secretary of Budget and Planning also declared that any public servant who personally executed such a contract or who was involved in the execution of such a contract would be personally liable.

(f) Shortly after the facts related above, the immediate result of such dispositions was to declare that any type of concession given to the Union relating to hydrocarbon products was unconstitutional, and thus illegal and void.

Under the practice prior to these regulations,

a fixed percentage of PEMEX contracts were granted to the Union without recourse to a bidding process. It was contemplated that the Union would either perform these contracts directly or by subcontract, retaining some percentage as profit; the profit in either case was expected to finance social programs for the workers. In practice, however, the Union's leaders created the Commissions in order to keep the profit outside of the Union, so the workers themselves did not benefit. PEMEX, in turn, was also damaged because it did not receive the best terms when contracting. In recognition of these irregularities, these types of practices were terminated beginning in 1984 by the Order of the now President of the Republic of Mexico, Lic. Carlos Salinas de Gortari. After these official orders, all PEMEX contracts had to comply with the formalities established by the law and in particular the principles established by Article 134 of the Constitution.

As stated in these reforms, any contract with a governmental entity, such as Petroleos Mexicanos, must be formalized, establishing in writing all obligations that derive from the contract, particularly in those cases in which the Law requires that Petroleos Mexicanos grant those contracts directly to the interested parties without intermediaries, as is the case of first hand sales of petroleum, natural gas, and products obtained from the processing of those products, according to Article 3, section II of the Regulatory Law to Article 27 of the Petroleum Branch and Article 2 of the

Organic Law of Petroleos Mexicanos.

The rights and obligations of the contract cannot be partially or totally assigned or transferred to any other individual or entity that is not a party to the contract. Any contract based, in whole or in part, on promises, inducements, side-deals or other arrangements, or involving parties not included in the contract, will be null and void as to the governmental entity. The individuals involved are personally responsible for the consequences of the contract, and will also be subject to criminal sanctions. Any modification or amendment to the contract must follow the same formalities as the original contract. The same laws dictate that the governmental entity is not responsible for any fraudulent and illicit promises, or side-deals that would make the contract null. Solely the individuals involved in such dealings are personally responsible for their actions.

In analyzing the allegations in the complaint and assuming strictly for purpose of this opinion that those allegations have any basis in fact, the types of "arrangements" described in paragraphs 17, 19, 21, 23, 24, 27, 28, 29, 30, 34, 35, and 36 of the complaint (solely as examples) are illegal and are completely without effect and null and void as a matter of law because they violate the laws described above.

Second, the legal reforms mentioned impose direct responsibility on the public servants who may have participated in such acts, assuming hypothetically that those acts occurred, and that responsibility can never be imposed on Petroleos Mexicanos.

Third, if a United States Court were to impose liability on Petroleos Mexicanos as a result of the allegations contained in the complaint, the objectives and essential principles of the legal reforms brought about by the moral renovation program would be frustrated by condoning and legitimizing the illegal "arrangements." Further, to require Petroleos Mexicanos to finance and to subsidize the corruption described in the complaint would wrongfully drain the resources of the Nation.

III.

Under the Mexican juridical system, Unions and societies have constitutional and legal status clearly distinct from decentralized agencies of the Public Administration.

1. Petroleos Mexicanos

(a) Petroleos Mexicanos is a Decentralized Public Organism of the Federal Government that forms part of the Federal Public Administration, and whose objectives compose the realization of all the activities of the petroleum industry, according to terms of the governing federal laws.

(b) The dissolution of Petroleos Mexicanos or the granting of its activities to another entity of the Federal Public Administration can only be achieved by decree of the Federal Congress through the abrogation or modification of the particular laws that presently govern the activities entrusted to Petroleos Mexicanos by the Nation.

(c) Petroleos Mexicanos is registered in the Public Registration of Decentralized Organisms before the Secretary of Budget and Planning (article 24 of the Federal Law of the Parastatal Entities).

2. Unions.

(a) In contrast, the objectives of unions are the protection of the private interests of their members, exercising the right to strike, and executing and administering Collective Bargaining Agreements with public or private entities. The Federal Labor Law governs the labor relationship, contained in Art. 123, Subsection A of the Constitution. All its principles, rules, and institutions tend to one sole function: the harmonious and just regulation of the relations between capital and labor.

The unions can own property only for the benefit of their members and for the fulfillment of their objectives (articles 374 and 375 of the Federal Labor Law). The unions are strictly prohibited from conducting commercial activities for profit (article 378 of

the Federal Labor Law).

(b) Because the unions are created by the free will of their members, only the members can dissolve the union, either according to the union charter or by vote of the members (articles 378 and 379 of the Federal Labor Law).

(c) The unions must be registered before the Secretary of Labor and Social Services when under federal jurisdiction and before the Board of Conciliation and Arbitration [Labor Courts] when under local jurisdiction (article 365 of the Federal Labor Law).

3. Societies

(a) The Commission of Contracts of the Executive General Committee of the Union of Petroleum Workers of the Republic of Mexico, S.C. [Civil Society], was incorporated as a civil society by means of the public record number 25905 formalized before the authority of Public Notary Number 65 of the Federal District, Lic. Pedro del Paso Carrara, and is governed by its articles of incorporation, the civil laws, and any other relevant regulations. In Mexico, the Civil Societies are authorized to perform commercial activities that do not constitute speculation.

(b) The civil societies are dissolved according to their articles of incorporation and by the happening of certain events listed in the Civil

Code.

(c) The Civil Societies, in contrast to the above, must be registered before the Public Registry of Civil Societies in order to deal with third parties (article 2694 of the Federal Civil Code). The Commission of Contracts is registered in Volume 445, page 126 of the Public Registry of Property of the Federal District.

As can be seen, under the mexican juridical system it is not possible to confuse the juridical personality of the Decentralized Public Organisms (Petroleos Mexicanos), the Unions (the Union of Petroleum Workers of the Republic of Mexico), and the Civil Societies (the Commission of Contracts of the Union); the relationship between them is unique under the law, and of course, because of their different and contrary goals none of them can be agent of the other and cannot even represent the other in any activity.

The three legal persons mentioned above, Petroleos Mexicanos, the Union, and the Commission of Contracts, were created under different legal frameworks and possess different formalities, objectives, and goals; they are registered in different public registries, and their functions and organization are controlled by different legal hyierarchies.

For further illustration, I cite some of their more notable differences below:

1. The objectives and functioning of Petroleos Mexicanos are established by the Regulatory Law to Article 27 of the Constitution in the Petroleum Branch and by the Organic Law of Petroleos Mexicanos, both laws issued by the Federal Congress.

The objectives of the National Union of Petroleum Workers of the Republic of Mexico, its duration, the conditions of membership, the rights and obligations of members, the meeting of members, the election of representatives and the term of their position, the Union dues, and the rules for the liquidation of their assets, are established in the Union charter, which is freely approved by the association of workers.

Turning on the other hand to the Commission of Contracts, S.C., according to its public articles of incorporation, the partners determine the goals and operating procedures of the entity pursuant to the ad hoc rules established in the Civil Code and the articles of incorporation.

2. Petroleos Mexicanos is registered in the Public Registry of Decentralized Organisms, under the Secretary of Budget and Planning; the Union of Petroleum Workers of the Republic of Mexico is registered in the Registry of Association of the Secretary of Labor and Social Services, and the Commission of Contracts of the S.T.P.R.M., S.C., in the Registry of Civil Societies of the Public Registry of Property and Commerce of the Department of the Federal District.

3. The Decentralized Organisms of the Federal Government, in addition to the specific laws creating them, must comply with and fulfill numerous regulations of public order; the Unions only follow the rules of the Federal Labor Law and those internal regulations established in their charters; and Civil Societies are governed by the Civil Code and their articles of incorporations.

4. The development and operations of Petroleos

Mexicanos are subject to the planning and budget rules established by the federal law. The unions freely govern their income and expenditures without the intervention of the authorities; the same is true of the civil societies, except that their profits and losses are distributed among the partners.

5. The offenses of officials and workers of Petroleos Mexicanos are sanctioned by the Federal Law of Responsibilities of Public Servants; the offenses of the unions are sanctioned according to the union's charter, and the wrongdoings committed by the civil societies, which are not considered crimes, only give rise to civil redress under the dictates of the Civil Code; and

6. In the fulfillment of its social objective, Petroleos Mexicanos performs commercial activities while the union is prohibited from exercising in commerce; and the Commission of Contracts has goals of a commercial character, although not of commercial speculation.

I reiterate to you the assurances of my attentive and distinguished consideration.

EFFECTIVE SUFFRAGE.
NO REELECTION.
Mexico, D.F., August 24, 1990
THE ATTORNEY GENERAL
OF THE REPUBLIC

[Signature]
Dr. Enrique Alvarez de Castillo